**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| JAMES DEAN WALTON, SR., LINDA JANE MCGEE, NICHOLAS CAVNAR as personal representatives for the estate of JAMES D. WALTON, JR., and KENNETH A. BRYANT, III as personal representative of the estate of RICHARD GREGORY CHITTICK, | ) | C.A. No. N18C-04-314 FWW |
| Plaintiffs, | ) | |
| v. | ) | |
| ROGER LOUIE COLE, | ) | |
| Defendant. | ) | |

Submitted: August 13, 2020
Decided: August 17, 2020

*Upon Defendant Roger Louie Cole's Motion for Summary Judgment*
**GRANTED IN PART** and **DENIED IN PART.**

**OPINION AND ORDER**

Lawrance Spiller Kimmel, Esquire and Brian S. Legum, Esquire, Kimmel, Carter, Roman, Peltz & O'Neill, P.A., Plaza 273, 56 West Main Street, 4th Floor, Newark, Delaware 19702, Attorneys for Plaintiffs.

Daniel P. Bennett, Esquire, and Kiadii S. Harmon, Esquire, Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, Citizens Bank Center, 919 North Market Street, Suite 200, Wilmington, Delaware 19801, Attorneys for Defendant.

**WHARTON, J.**

## I. INTRODUCTION

James Dean Walton, Jr. and Richard Gregory Chittick were killed on October 21, 2017 as they stood with their bicycles in broad daylight at 5:00 p.m. outside the Starboard Restaurant on the southbound side of Coastal Highway in Dewey Beach, Delaware. Without warning, a Chevy Suburban accelerated rapidly, crossed over the median from the northbound lanes of traffic, struck both of them at a speed of about 65 miles per hour, and killed them both. They had no chance.

The personal representatives of their estates - James Dean Walton, Sr., Linda Jane McGee, and Nicholas Cavnar for the estate of James Dean Walton, Jr., and Kenneth A. Bryant, III for the estate of Richard Gregory Chittick (collectively "Plaintiffs") - have brought a wrongful death action against the driver of the Suburban, Defendant Roger Louie Cole ("Cole").[1] Because there is no genuine issue of material fact that the deaths of James Dean Walton, Jr. ("Walton") and Richard Gregory Chittick ("Chittick") were caused by an unforeseen sudden medical emergency suffered by Cole, his Motion for Summary Judgment is **GRANTED IN PART.** But, because there is a genuine issue of material fact as to whether the deaths were avoidable, the Motion is **DENIED IN PART.**

[1] Compl., D.I. 1.

## II. FACTUAL AND PROCEDURAL CONTEXT

The basic facts are as simple as they are tragic. In the language of the police report:

> Vehicle 1 [the Suburban] was travelling northbound on Coastal Highway (SR 1), just south of the intersection with Bellevue Street, within the limits of Dewey Beach. Operator 1 [Cole] suffered an acute medical event and began to accelerate at a high rate of speed, crossing a raised concrete median into and across the southbound travel lanes and shoulder. Vehicle 1 entered a sidewalk before striking a utility pole with its front center…Nearly instantaneously after striking the pole, Vehicle 1 struck the two Victims with its front center…Vehicle 1 continued in a northbound direction of travel and struck a wooden bench at the edge of the Starboard Restaurant parking lot with its front left…
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> After the Pedestrians were struck, Victim 2 [Chittick] was projected north and struck the Starboard Restaurant marquee sign…before coming to rest in the landscaping bed….Victim 1 [Walton] came to rest partially under Vehicle 1….[2]

These facts are not in dispute.

Cole moves for summary judgment, claiming that the undisputed material facts establish that he suffered an unanticipated and unforeseen seizure which left him physically and mentally incapable of controlling his vehicle.[3] As a result, he argues that he is entitled to judgment as a matter of law under the sudden medical

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[2] Def.'s Mot. Summ. J., Op. Br., Ex. A at 6, D.I. 17.
[3] Def.'s Mot. Summ. J., Op. Br. at 5, D.I. 17.

emergency doctrine.[4] Plaintiffs, while not denying that Cole suffered a medical event on the date of the accident, dispute that Cole's seizure was unanticipated and unforeseeable.[5] They insist that there exist genuine issues of material fact regarding the foreseeability of Cole's medical event and whether he had sufficient warning at the onset of the event so as to avoid the accident.[6]

## III. STANDARD OF REVIEW

Super. Ct. Civ. R. 56(c) provides that summary judgment is appropriate where there is "no genuine issue as to any material fact…and the moving party is entitled to a judgment as a matter of law."[7] The moving party initially bears the burden of establishing both of these elements; if there is such a showing, the burden shifts to the non-moving party to show that there are material issues of fact for resolution by the ultimate fact-finder.[8] The Court considers the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" in determining whether to grant summary judgment.[9] Summary judgment will be appropriate only when, upon viewing all of the evidence in the light most favorable to the non-moving party, the Court finds that there is no genuine issue of material

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[4] *Id.*
[5] Plfs.' Ans. Br. at 7, D.I. 21.
[6] *Id.*
[7] Del. Super. Ct. Civ. R. 56(c).
[8] *See, More v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citations omitted).
[9] Del. Super. Ct. Civ. R. 56(c).

fact.[10] When material facts are in dispute, or "it seems desirable to inquire more thoroughly into facts to clarify the application of the law to the circumstances, summary judgment will not be appropriate."[11] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[12]

## IV. THE PARTIES' CONTENTIONS

In his motion, Cole first observes that it is not disputed by the parties' respective medical experts that he suffered a generalized seizure that left him physically and mentally incapacitated, and that the expert opinions are consistent with witness observations.[13] In arguing that the seizure here was unforeseeable, Cole emphasizes that he had never had a seizure while driving and had not been restricted from driving by any physician or state, regularly consulted with physicians who noted in their records that he was seizure free and his condition was controlled, was compliant with his medical regimen, was told by his physicians that his seizures were controlled by the medication Keppra, and had not had a seizure in over six

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[10] *Singletarry v. Amer. Dept, Ins. Co.*, 2011 WL 607017 at *2 (Del. Super. 2011) (citing *Gill v. Nationwide Mut. Inc. Co.*, 1994 WL 150902 at *2 (Del. Super 1994)).
[11] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69, (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).
[12] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[13] Def.'s Mot. Summ. J. at 7, D.I. 17.

years.[14] Therefore, form his perspective, the seizure on October 21, 2017 was unanticipated and unforeseen.[15]

Plaintiffs take the position that Cole has not met his burden of establishing that his seizure was unanticipated and unavoidable.[16] They argue that Cole had ample time, approximately a minute, to pull over to the side of the road once he began experiencing a pre-seizure prior to the seizure itself, making the specific moment Cole's medical event went from dizziness and lightheadedness to incapacitating a material issue to be presented to the jury.[17] They also argue that Cole had previously experienced similar pre-seizure symptoms while driving, was non-compliant with his treatment regimen and failed to follow his doctor's recommendations.[18] In particular, they argue that Cole was inconsistent in seeing his physicians, failed to increase his Keppra dosage, and repeatedly failed to have bloodwork performed and bring his CPAP machine to his medical appointments for evaluation.[19]

Cole anticipated some of the Plaintiffs' arguments in his Opening Brief. Cole argues that Plaintiffs' contention that his alleged non-compliance with treatment

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[14] *Id.* at 9.
[15] *Id.*
[16] Plfs.' Ans. Br. at 9, 16, D.I. 21.
[17] *Id.* at 10-14.
[18] *Id.* at 18-29.
[19] *Id.*

made it more likely he would have a seizure misses the point. In Cole's view the question is not whether his behavior made a seizure more likely to occur, but, rather, whether that conduct caused the incapacity to be more foreseeable to him.[20] Cole also argues that Plaintiffs' claim that he had ample time to avoid the accident after the onset of a pre-seizure aura is at odds with the facts.[21]

## V. DISCUSSION

The parties direct the Court to *Lutzkovitz v. Murray*,[22] which they believe establishes the law in Delaware on the sudden medical emergency doctrine. In *Lutzkovitz,* the plaintiff was stopped in his vehicle at a traffic light when he was struck from behind by the defendant. The defendant claimed he inexplicably blacked-out prior to the accident, and, therefore, was not culpable due to a sudden, unanticipated illness. The trial court instructed the jury that the defendant may not be held liable if the accident was unavoidable, but refused the plaintiff's request that the jury also be instructed that the accident was not unavoidable if the defendant had prior dizzy spells, or knew or should have known he might be subject to them. The issue on appeal was the trial court's rejection of the plaintiff's request. Lutzkovitz argued on appeal that the defendant's impairment was proven at trial to be foreseeable, making the accident avoidable. Thus, the trial court erred in failing to

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[20] Def.'s Op. Br. at 19, D.I. 17.
[21] *Id.* at 21-24.
[22] 339 A.2d 64 (Del. 1975).

instruct the jury on the foreseeability of the defendant's medical condition. The Delaware Supreme Court, finding that there was "sufficient evidence to raise the factual issue of whether defendant was negligent in operating his motor vehicle when he knew or should have known that he was subject to a possible loss of control by reason of the prior symptomatic manifestations of his infirmities," held that it was error not to give an instruction along the lines requested by the plaintiff.[23] In other words, if the medical condition was foreseeable, then the accident was not unavoidable.

There are but two issues before the Court in the Motion for Summary Judgment. They are: 1) whether there is a genuine issue of material fact, given Cole's medical history and level of compliance with the directives of his doctors, that the seizure event that caused his vehicle to strike and kill Walton and Chittick was foreseeable; and 2) whether Cole had ample time and ability to avoid the accident after he first became aware that he was experiencing a medical event. The Court examines the record evidence in the light most favorable to Plaintiffs to determine if there is a genuine issue of material fact as to whether Cole's seizure was foreseeable and the accident was avoidable. In addition to the briefs and argument, the Court has carefully reviewed the exhibits to each brief. Those exhibits include the police reports, Cole's deposition testimony and his statement to the

[23] *Id.* at 67.

police, his medical records, the expert report of Plaintiffs' medical expert, Dr. Alan J. Fink, M.D., and the two expert reports authored by Dr. David Buchholz, M.D., Cole's medical expert. Because both parties premise their arguments on the opinions of their respective experts, and because the doctors both have reviewed substantially all of the information, both factual and medical, in the case in forming their opinions, the Court will focus its discussion on their reports. In doing so, the Court is mindful that it must resist the temptation to decide the Motion based on which expert's opinion is more persuasive. The Court also is mindful that an expert opinion must be faithful to the facts upon which it purports to be based.

In his report of September 11, 2019, Dr. Buchholz, a Board–Certified Neurologist and Associate Professor of Neurology at The Johns Hopkins University, is unequivocal:

> The motor vehicle accident in which Mr. Cole was involved on 10/21/17 was the result of an acute medical event (sudden medical emergency) which he could not reasonably have either anticipated or prevented. Specifically, he had an unpredictable "breakthrough" generalized tonic-clonic ("grand mal") seizure despite his therapeutic compliance with antiseizure medication (levetiracetam/Keppra 500 mg twice daily) which he had been taking a stable dosage for over seven years for a well controlled seizure disorder with onset at age 16, and without any medical record of overt seizure activity since at least 2010.[24]

[24] Def.'s Op. Br., Ex. B at 2, D.I. 17.

In discussing the intersection of Cole's seizures with his medication history, Dr. Buchholz quotes Dr. Dharmesh Patel, M.D., Cole's neurologist, who noted on February 20, 2012, "'In regard to his [Cole's] seizures, he has not had a seizure since we transitioned him from Dilantin to Keppra. He may have had one breakthrough generalized seizure during the transition, but has been seizure free for two years now.'"[25] Dr. Patel continued Cole on the same dose of Keppra.[26] Again at a follow-up visit on August 9, 2012, Dr. Patel reported that Cole was then seizure free for 2 ½ years.[27] An EEG on September 14, 2012 did not warrant an increase in Cole's medication.[28] Dr. Buchholz continued to trace the records of Dr. Patel and Dr. Marek Grawel, M.D., Cole's primary care physician, through October 3, 2016 showing no further seizures while Cole continued to take Keppra 500 mg. twice daily.[29] Dr. Buchholz summarized his conclusion:

> In short, Mr. Cole had not only a well established diagnosis of a longstanding seizure disorder but also a consistent track record of cooperation with, and effectiveness of his medication regimen, such that he had no reason whatsoever to suspect that after so many years of seizure-free stability he would suddenly, unexpectedly, and through no fault of his own experience a spontaneous breakthrough seizure while driving on 10/21/17.[30]

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[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 3.
[30] *Id.*

The Court finds that Cole has met his burden of preliminarily establishing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law sufficiently to shift the burden to Plaintiffs to show that there are material issues of fact for resolution by the ultimate fact finder.

In their effort to meet that burden, Plaintiffs rely on Dr. Fink, a Board-Certified Neurologist, who practices locally. Dr. Fink disagrees with Dr. Buchholz in two significant respects.[31] First, he frames the relevant inquiry as, "How did the events of October 21, 2017 come to be, and how could they have been prevented?" Dr. Fink opines that Cole's "history reveals acts of non-compliance that lowered his seizure threshold (increasing his chance to have a seizure) and made the likelihood of a seizure occurring on October 21, 2017 more likely."[32] Second, Dr. Fink believes that Cole had the time and the capability, after the onset of the medical event, but prior to experiencing the general seizure, to pull his vehicle to the side of the road, since he was able control the vehicle for about a minute while travelling approximately 2,000 feet.[33] In summary, Dr. Fink's opinion is that the deaths of James Dean Walton, Jr. and Richard Gregory Chittick were avoidable, but: 1) Cole's non-compliance with CPAP increased his chances of having a seizure on October

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[31] He agrees with Dr. Buchholz that Cole suffered a generalized seizure on October 21, 2017 and that there is no evidence hypoglycemia (low blood sugar) played any role in Cole's auras or seizures. Pls.' Ans. Br. Ex E at 12, D.I. 21.
[32] Pls.' Ans. Br. Ex. E at 2, D.I. 21.
[33] *Id.* at 12.

21, 2017; 2) Cole's non-compliance with his treating neurologist by not seeing him for a follow-up and having his blood tested in the two years before the collision resulted in him being prescribed an inadequate dosage of Keppra; and 3) Cole failed to pull over safely onto the shoulder when he felt lightheaded and dizzy, knowing he had a seizure disorder, while operating his vehicle for nearly 60 seconds and travelling approximately 2,000 feet.[34]

On the first question of whether Cole's generalized seizure was foreseeable, Dr. Buchholz[35] and Dr. Fink, and, by extension, the parties who rely on them, are talking past each other. Dr. Buchholz takes on the issue of foreseeability from Cole's perspective. In other words, "Should Cole have foreseen the generalized seizure that occurred on October 21, 2017 in light of the apparent effectiveness of his antiseizure medication?" Dr. Fink, on the other hand, views the question as "Did Cole's non-compliance with certain instructions given to him by his doctors increase the likelihood that he would have a seizure?" In theory, both can be true. One can increase the likelihood of an event occurring by one's behavior. But, unless one is aware, or should be aware, that the conduct in fact is increasing the likelihood of the event, the event is not any more foreseeable. It is only knowledge of the potential

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[34] *Id.* at 13.

[35] Dr. Buchholz has submitted a rebuttal report in which he disputes, at times vigorously, Dr. Fink's conclusions and interpretation of the record. Def.'s Op. Br. Ex. E., D.I. 17. For the reasons discussed it its decision, the Court finds it unnecessary to adjudicate this portion of their dispute.

linkage of conduct with consequences that conduct makes consequences foreseeable. It is that knowledge, or lack of it, that makes Cole's conduct negligent, reckless, careless or not culpable.

Cole has cited *McCall v. Wilder*[36] for the proposition that for the sudden medical emergency defense to be unavailable, Cole "would have had to be made aware of facts sufficient to lead a reasonably prudent person to anticipate that driving in that condition would likely result in an accident.[37] The Tennessee Supreme Court provided this non-exclusive list of considerations helpful in determining if the sudden medical emergency was foreseeable: the extent of the driver's awareness or knowledge of the condition that caused the sudden incapacity; whether the driver was under a physician's care for the condition at the time; whether the driver was prescribed and had taken medication for the condition; the number, frequency, extent, and duration of prior incapacitating episodes while driving and otherwise; when other incapacitating episodes occurred in relation to the accident; physician's guidance regarding driving; and medical opinions regarding the nature of the condition, compliance with treatment, foreseeability of the incapacitation, and potential advance warnings the driver would have experience immediately prior to the accident.[38] Plaintiffs accept, at least implicitly, the relevance of the *McCall*

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[36] 913 S.W. 2d 150 (Tenn. 1995)
[37] Def.'s Op. Br. at 12, D.I. 17.
[38] *McCall* at 156.

considerations, but they emphasize two – adherence to treatment and potential advance warnings immediately prior to the collision – that support denial of the motion.

Here it is undisputed, in other words, there is no genuine issue of material fact that Cole had not had a seizure in seven years while conscientiously taking Keppra 500 mg twice daily. He had never had one while driving and he had never been told by any doctor that he should not drive. He had no reason to suspect that he would suffer a breakthrough generalized seizure on October 21, 2017. In particular, Dr. Fink fails to identify a single instance when Cole was told that a foreseeable consequence of his alleged non-compliance, including his failure to get blood work done, his failure to bring his CPAP machine to appointments, or any other failure of compliance, increased the likelihood of him suffering an incapacitating seizure. The fact that Dr. Buchholz strenuously contests the significance or relevance of these claimed acts of non- compliance in causing the generalized seizure on October 21, 2017 only confirms the lack of foreseeability by Cole, who has no medical training. The point is not whether Dr. Fink or Dr. Buchholz is correct. Rather, the point is that if Dr. Buchholz with his impressive medical credentials would not have foreseen Cole's conduct as increasing his risk of having a seizure, it is unreasonable to hold Cole, a layman, to a higher standard by expecting him to have been able to foresee

that increased risk.[39] Therefore, on the issue of foreseeability, the Court finds that there is no genuine issue of material fact and Cole's Motion for Summary Judgment is **GRANTED IN PART** on the issue of foreseeability.

A different conclusion obtains when the Court looks at the question the question of whether the accident was avoidable. Based on photographs and video recordings of Cole driving, seemingly under full control of his vehicle, Dr. Fink posits that Cole should have been able to pull over to the side of the road prior to the full effects of the medical event taking hold. In that sense, it is Dr. Fink's opinion that the accident was avoidable. Dr. Buchholz, on the other hand opines that Cole was essentially on autopilot after turning onto Coastal Highway and had no ability to pull over safely, making the accident unavoidable. Which doctor has the better of the argument is a question of fact for the jury to decide, not the Court. Accordingly, because there is a genuine issue of material fact as to whether the accident was avoidable, the Motion for Summary Judgment is **DENIED IN PART**.

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[39]During oral argument, counsel for Plaintiffs suggested that common sense dictated that Cole should have inferred that failure to follow his doctors' directions would lead to an increased risk of having a seizure. But, that inference depends on what directions his doctors were giving him. The connection between bringing in his CPAP machine for examination and seizure prevention is obscure at best, as is having bloodwork done unrelated to assaying Keppra levels. Further, clinically, his doctors were satisfied in his dosage of Keppra for years after considering, but not prescribing, an increase.

## VI. CONCLUSION

Therefore, for the reasons set forth above, and because there are no issues of material fact on the issue of the foreseeability of the accident and Defendant Roger Louie Cole is entitled to judgment as a matter of law on that issue, Defendant Roger Louie Cole's Motion for Summary Judgment is **GRANTED IN PART.**

Because genuine issues of material fact exist on the question of avoidability, Cole's Motion for Summary Judgment is **DENIED IN PART** on that issue.

**IT IS SO ORDERED.**

Ferris W. Wharton, J.